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IN THE

Supreme Court of the United States

October Term, 1960

No. 460

ANTHONY PETER RIELA,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF TIOGA COUNTY, NEW YORK

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INDEX

	Page
Opinions Below	1
Grounds On Which Jurisdiction Is Invoked	2
Questions Presented for Review	2
Statutes Involved	3
Statement of the Case	4
Timely Raising of Federal Questions	5
Reasons for Granting the Writ	9
Conclusion	18

Appendices

A. Opinion, Court of Appeals, People v. Riela, 7 N. Y. 2d 571, 200 N. Y. S. 2d 33, reproduced	1a
Cited	1, 7, 9, 10, 11
B. Order of Court of Appeals, denial of motion for reargument, July 8, 1960	7a
Cited	1, 2
C. Order of Court of Appeals, amending remittitur to insert constitutional question, July 8, 1960	8a
Cited	2
D. Judgment of Conviction, July 12, 1960	10a
Cited	2

PAGE

E. Excerpts of Statutes Involved 13a
Cited 3, 4

(i) Penal Law § 600 subd. 6 ..... 13a
Cited 3, 4

(ii) Code of Criminal Procedure § 618-a 13a
Cited 3, 4, 5, 6, 12, 14

(iii) Penal Law § 2447 subd. 1, 2, 3(c), 4 ..... 15a
Cited 3, 4, 6, 11, 12, 13, 14

(iv) Unconsolidated Laws § 7052 subd. (5), (6), (7) and (9), McKinney's Vol. 65, Part 2 .. 16a
Cited 3, 4, 6, 13, 14, 16, 17

(v) New Jersey Revised Statutes, Article 2, 2A:81-4 and 2A:81-5 ..... 17a
Cited 3

(vi) General Business Laws § 352 subd. 5 (Vol. 19 McKinney's Consol. Laws) 17a
Cited 3, 17

Table of Cases Cited

In re: Amato, 204 Misc. 454, 459, 124 N. Y. S. 2d 726, 730 16

Brown v. United States, 359 U. S. 41, 49 ..... 10, 11, 12
Brown v. Walker, 161 U. S. 591 17

Carlson v. United States (C.A. 1st), 209 F. 2d 209, 214, 215 ..... 10, 12
Commission of Investigation v. Lombardozzi, 5 N. Y. 2d 1026, 185 N. Y. S. 2d 550, appeal dismissed, sub nom Castellano v. Commission of Investigation, 361 U. S. 7 10

Dunham v. Ottinger, 243 N. Y. 423, 438-439 17

PAGE

Emspak v. United States, 349 U. S. 190, 197, 202 10

Feldman v. United States, 322 U. S. 487, 489, 493 .. 15

Gendron v. Burnham, 146 Me. 387, 405-406, 82 A. 2d 773, 784-788 10

Herlands (Carcietta) Matter of, 204 Misc. 373, 377, 124 N. Y. S. 2d 402, 405-406 16

Hoffman v. United States, 341 U. S. 479 .... 4, 15, 16, 17, 18

Jack v. Kansas, 199 U. S. 372 .... 17, 18

Knapp v. Schweitzer, 357 U. S. 371 .... 10, 15, 17

Leviné v. United States, 362 U. S. 610, 612 10

Mills v. Louisiana, 360 U. S. 230 .... 10, 11

Quinn v. United States, 349 U. S. 155, 167 9

Raley v. Ohio, 360 U. S. 423, 435 .... 10, 11

State of New York v. O'Neill, 359 U. S. 1, 8 .... 13, 14, 15

Ullman v. United States, 350 U. S. 422 15

FEDERAL STATUTES INVOLVED

28 U. S. C. § 1257 (3) 2

UNITED STATES CONSTITUTION

Fourteenth Amendment 2, 7, 12, 13

IN THE

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October Term, 1960

No.

ANTHONY PETER RIELA,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COUNTY COURT OF TIOGA COUNTY, NEW YORK

The petitioner, Anthony Peter Riela, prays that a writ of certiorari issue to review the judgment of the County Court of Tioga County of the State of New York, entered in the above entitled case on July 12, 1960.

Opinions Below

The opinion of the Court of Appeals is reported in 7 N. Y. 2d 571, 200 N. Y. S. 2d 43, appended hereto as Appendix "A"; the Appellate Division, Third Department opinion, is reported in 9 App. Div. 2d 481, 195 N. Y. S. 2d 558 and is set forth in the Record at pages 456-463; the trial court, County Court, Tioga County opinion is reported in 14 Misc. 2d 213, 178 N. Y. S. 2d 873, and is set forth in the Record at pages 430-446; the Court of Appeals opinion denying

the motion for reargument is dated July 8, 1960 and is appended hereto as Appendix "B", and the Court of Appeals opinion amending the remittitur to include a constitutional question is dated July 8, 1960 (not yet officially reported), is appended hereto as Appendix "C".

Grounds On Which Jurisdiction Is Invoked

(i) The judgment of the Tioga County Court was entered on July 12, 1960 (Appendix "D") based upon the judgment of the Court of Appeals which, on April 20, 1960, reversed in part the judgment of conviction of the Appellate Division, Third Department, and remitted the case to the Tioga County Court for resentence.

(ii) A motion for reargument was denied by the Court of Appeals on July 8, 1960 (Appendix "B").

(iii) The jurisdiction of this Court is invoked under 28 U.S.C. 1257 (3).

Questions Presented for Review

(1) Was the contempt conviction repugnant to the Fourteenth Amendment where a New York grand jury confers New York State immunity on a New Jersey resident witness, repeats the questions and the witness reasserts his plea of privilege, *but the Court fails to direct the non-resident witness to answer* the questions or to permit witness to prove the existing perils of prosecution in his home state and the Federal government as well as the inadequacy of the immunity offered?

(2) Is the joint application of Penal Law § 2447 with § 618-a of the Code of Criminal Procedure, to the facts

herein, repugnant to the spirit and interpretation of the Fourteenth Amendment, and were the witness's rights and privileges thereunder violated, where a New York nonresident grand jury witness, a target of investigation and a potential defendant, is brought into New York by designating him as a material witness, and the New York immunity conferred is not co-extensive with the perils of prosecution existing for him in his home state, other states and the Federal government, and Tioga County grand jury minutes have, pursuant to court orders, been transmitted without secrecy restrictions, to New York State agencies which are obligated by state (§§ 7051-7057, McKinney's Unconsol. Laws) to cooperate with witness's home state, other states and the Federal government and *the Court fails to direct the witness to answer* grand jury questions despite his pleas of privilege against self-incrimination?

(3) Was appellant denied due process by court's preclusion of proof as to the existence and reality of the perils of prosecution, lack of authority, good faith and jurisdiction of the grand jury and inadequate immunity conferred?

Statutes Involved

Penal Law § 600, subd. (6).

Code of Criminal Procedure § 618-a, subd. 2, 3.

Penal Law § 2447, subd. 1, 2, 3(c).

Unconsolidated Laws § 7052, subd. 5, 6, 7, 9.

New Jersey Revised Statutes, Article 2, 2A:81-4 and 2A:81-5.

General Business Law § 352, subd. 5.

(The aforementioned statutes are set forth in Appendix "E".)

Statement of the Case

Appellant, a New Jersey resident, a potential defendant and target of investigation of the Tioga County Grand Jury of New York, was pursuant to the application of § 618-a of the New York Code of Criminal Procedure, compelled to appear there as a material witness. He asserted his constitutional privilege against self-incrimination before that body in refusing to answer their questions. The grand jury having knowledge of his non-residency, offered him New York State immunity (Penal Law § 2447), and again questioned him. Again he pleaded privilege. Instead of being taken before the Court for a direction to answer or permitted to establish his real and existing peril of prosecution, in his home state, other states and the Federal government, the grand jury indicted him for contempt of court (Penal Law § 600, subd. (6)).

At the trial, a jury was waived.

The defense established his non-residency, the improper application of § 618-a C.C.P. and § 2447 P.L. to the instant case, the absence of a court direction that the witness answer grand jury questions, the transmittal of grand jury minutes to state agencies cooperating with other states and the Federal government (§§ 7051-7057, Unconsolidated Laws, McKinney's) and the obvious inadequacy of New York immunity to a non-resident witness.

The defense was precluded from proving that the existing perils of prosecution were real and substantial (*Hoffman* v. *United States*, 341 U. S. 479); that the grand jury

was not acting in good faith but was created and used as the "tool" of the Acting Commissioner of Investigation; that it lacked jurisdiction and authority to pursue the inquiry; that it was investigating a meeting and a party and not a crime (R. 182); and that the New York immunity was dissipated when the grand jury minutes were made available to agencies cooperating with other states and the Federal government, the judge having failed to impose restrictions on their secrecy.

Timely Raising of Federal Questions

The federal questions sought to be reviewed are and were raised as follows:

(i) The denial of procedural due process by the improper application and use of a § 618-a of the Code of Criminal Procedure to obtain the presence in New York State of the non-resident appellant by alleging he was a material witness before a New York grand jury when in fact he was a potential defendant and target of investigation.

This issue was raised before the trial court by motion on February 13, 1958 and denied (R. 31); on the motion to acquit (R. 269, 289), denied (R. 269, 422); by statements to the court (R. 31, 50-56), and by the District Attorney's statement to the appellant (R. 71). The trial court's opinion held that this issue is collateral and not relevant and that the witness appeared voluntarily (R. 445).

The point was further pursued before the Appellate Division, Third Department in Point II (pp. 17-23) of Appellant's Brief and rejected in that court's opinion (R. 457-459).

In the Court of Appeals, the point was urged in Point VI (pp. 36-42). The Court of Appeals considered this argument in conjunction with other constitutional issues as appears from the amendment of its Remittitur on July 8, 1960 (Appendix "C").

(ii) The joint application of § 618-a Code of Criminal Procedure with § 2447 Penal Law to a New York non-resident violates procedural due process under the Fourteenth Amendment where the witness is a potential defendant and a target of investigation, and the New York State immunity is not co-extensive with the perils of prosecution in the witness's home state, other states, and the Federal government, where New York grand jury minutes are forwarded to a State Commission of Investigation obligated by statute (Unconsol. Laws, § 7052, subd. (5, 6)) to investigate violations of federal law in New York and to cooperate with other states and the Federal government.

This point was urged before the trial court in a motion for dismissal of the indictment (R. 201, 210-214, 218-219, 262, 304-306, 344-345), and in a motion for arrest of judgment (R. 383-385, 402, 405-406). The motions were denied (R. 269, 422), and the argument overruled in its opinion (R. 437-439).

The point was further pursued before the Appellate Division, Third Department in Point II (pp. 17-23) of Appellant's brief before that Court and rejected in its opinion (R. 461).

The Court of Appeals refrained from commenting on this issue in its opinion. However, the remittitur as amended (Appendix "C"), concedes that the issue was presented to, passed upon, and rejected by that Court.

iii) The failure of the Court to order or direct the non-resident grand jury witness to answer questions to which the plea of privilege is asserted, after the offer of New York immunity and the witness' reassertion of his plea, where the existing peril of prosecution is real and substantial, and the grand jury minutes transmitted to a New York agency cooperating with other states and the Federal government, constitutes a denial of procedural due process in violation of the Fourteenth Amendment.

This point was urged before the trial court (R. 191-193, 196, 137) upon cross-examination of the grand jury foreman, by motion for a directed judgment of acquittal, (denied R. 199), and by motion for dismissal of the indictment and for acquittal (R. 203-204). These motions were denied (R. 206); by offer of proof to show existing perils of prosecution, argument (R. 222, 232, 237-238), denied by the Court (R. 249, 252, 259-262); by motion to acquit and the denial thereof (R. 268-269); by motion for judgment of acquittal and summation (R. 275-277, 282-283, 285-286, 288, 294, 304-306, 313-316, 349, 354), denied by the Court's decision (R. 373); by motions for arrest of judgment and for a new trial (R. 380-417) which were denied (R. 422). The Trial Court's opinion dismissed this argument (R. 433).

The point was argued before the Appellate Division, Third Department, in Appellant's Brief (Point I, pp. 13-16) and overruled (R. 460-461).

The point was submitted to the Court of Appeals in Appellant's Brief (Point I, pp. 13-21) but evaded by that Court, 7 N. Y. 2d 571, 575-576, 200 N. Y. S. 2d 43, 45, which held "that the Grand Jury had unquestioned power to confer immunity upon Riela and direct him to answer under pain of prosecution for contempt."

(iv) The offer of New York State immunity to a non-resident is not co-extensive with the existing perils of prosecution where the witness must return to his home state and where New York Grand Jury minutes are transmitted to divers agencies cooperating with his home state, other states, and the Federal government. The trial court's rejection of the appellant's offer of proof to establish the existing perils of prosecution and the absence of a court hearing on his asserted plea of privilege before the Grand Jury after conferral of New York immunity, constituted a denial of due process.

This issue was presented to the trial court by offer of proof (R. 208, 232, 248, 249), denied (R. 249); by motion for acquittal and summation (R. 304-305, 384, 402-406), denied (R. 422). The court's opinion dismissed the contention (R. 437-439).

The issue was presented to the Appellate Division, Third Department, by Appellant's Brief (Point II, pp. 17-23) and rejected by its opinion (R. 461).

The issue was presented to the Court of Appeals in Appellant's Brief (Point II, pp. 21-24) and Point VI (pp. 36-38). The Court overruled appellant in its opinion, 7 N. Y. 2d 571, 576, 200 N. Y. S. 2d 43, 45 stating: "And to the second point, it is equally clear, under current decisions, that a witness may be compelled to answer in a state proceeding, as long as the immunity granted by the state protects against prosecution under *its* laws, even though it may not protect against prosecution by the Federal government or by other states."

(v) The trial court's denial of the appellant's offer of proof to show the lack of authority, jurisdiction and good faith of the Grand Jury, constituted a denial of due process.

This issue was presented to the trial court by appellant by cross-examination of the grand jury foreman, excluded by the court (R. 178-179, 182, 164, 146, 172-176), by offer of proof (R. 255-259), denied (R. 262); by motion to acquit (R. 268-275), denied (R. 269); by reading the court orders into the record (R. 213-216); by motion for arrest of judgment (R. 389, 400, 410, 412), denied (R. 422). The trial court upheld the authority, jurisdiction and good faith of the grand jury by adopting the theory of presumption of regularity (R. 435) over the presumption of innocence (R. 205).

The point was argued to the Appellate Division, Third Department in appellant's brief (Point VI, pp. 31-36). That Court ignored the issue by holding that a grand jury may investigate whether a crime has been committed or not (R. 462).

The point was presented to the Court of Appeals in Appellant's Brief (Point V, pp. 31-36) and held not to warrant discussion, 7 N. Y. 2d 571, 575, 200 N. Y. S. 2d, 43, 45.

Reasons for Granting the Writ

(1) The lack of a Court direction that witness answer.

The lack of a Court direction that a witness answer where a plea of privilege is asserted, constitutes a denial of due process and a violation of uniformly recognized procedure in both state and federal courts. *Quinn v. United State*, 349 U. S. 155, 167.

A conflict pertaining to the validity of procedure in contempt adjudication exists between the New York Court of

Appeals in *People* v. *Riela*, 7 N. Y. 2d 571, 200 N. Y. S. 2d 43, and this Court in *Brown* v. *United States*, 359 U. S. 41, 49; *Levine* v. *United States*, 362 U. S. 610, 612; *Raley* v. *Ohio*, 360 U. S. 423 (state court-direction by court); *Mills* v. *Louisiana*, 360 U. S. 230 (state court-direction by court); *Knapp* v. *Schweitzer*, 357 U. S. 371 (state court-direction by judge in § 750 Judiciary Law proceeding); *Emspak* v. *United States*, 349 U. S. 190, 197, 202 (Congressional Committee-direction required); the First Circuit Court, in *Carlson* v. *United States*, 209 F. 2d 209, 214 (C.A. 1st Cir.) (court direction required—United States District Court Grand Jury); the Supreme Judicial Court of Maine, in *Gendron* v. *Burnham*, 146 Me. 387, 405, 406, 82 A. 2d 773, 784-788 (state court-direction required).

The New York Court of Appeals held that State Immunity conferred was adequate and cited *Mills* and *Knapp*, *supra*, and *Commission Of Investigation* v. *Lombardozzi*, 5 N. Y. 2d 1026, 185 N. Y. S. 2d 550, appeal dismissed *sub nom. Castellano* v. *Commission Of Investigation*, 361 U. S. 7. *Mills* and *Knapp* each had a court direction after the grant of immunity. *Castellano* had the direction by the Commission after the immunity grant. None of these cases involved a New York non-resident.

As to the required court direction, the Appellate Division, Third Department, in its opinion (R. 461) stated:

> "The case of Brown v. United States, (359 U. S. 41) uses language from which appellant gains some comfort, but it involved a Federal statute and is by no means controlling in New York State in a prosecution under section 600 of the Penal Law and where the procedure authorized by section 2447 of the Penal Law was meticulously followed."

The New York Court of Appeals (7 N. Y. 2d 571, 200 N. Y. S. 2d 43, 45) adopted this reasoning by stating: "It is necessary only to observe that a reading of section 2447 makes it manifest that the grand jury had unquestioned power to confer immunity upon Riela and direct him to answer under pain of prosecution for contempt." This begs the question for it omits the entire issue of procedural due process.

Penal Law § 2447 is no more effective in granting State immunity as applied to the instant case than the immunity conferred federally in *Brown* v. *United States*, 349 U.S. 41, by § 205 of the Motor Carrier Act (49 U.S.C. 305 (d)); or the Ohio immunity statute in *Raley* v. *Ohio*, 360 U. S. 423; or, the Louisiana statute conferring immunity in *Mills* v. *Louisiana*, 360 U. S. 230. Each of these cases held that even though immunity be conferred by statute, the *specific direction* to answer is a vital condition precedent to the commission of contempt.

Penal Law § 2447 sets forth the condition precedent for the grand jury conferring immunity but it does not and cannot substitute the right of a witness to be heard by the court to interpose his plea of privilege against self-incrimination and to establish the validity thereof. This statute cannot usurp the power and duty of a trial judge to evaluate the merits of the plea of privilege, especially where a non-resident is involved under the peculiar facts herein. If it does, it denies the substantive due process as well as procedural due process of a witness. It was so applied here.

The New York Court of Appeals ignored *Brown* v. *United States*, 359 U. S. 41, 49, cited and argued by appellant. The

procedure there set forth by Mr. Justice Stewart at 351 U. S. 41, *49* is clear and unambiguous.

> "Even after an adverse ruling upon the claim of privilege, the petitioner was still guilty of no contempt. It was incumbent upon the court unequivocally to order the petitioner to answer. * * * The court did so.
>
> "When upon his return to the grand jury room the petitioner again refused to answer the grand jury's questions, now in direct disobedience of the court's order, he was for the first time guilty of contempt, * * * "

Due process requires the Court to give the witness an opportunity to be heard. *Carlson* v. *United States*, 209 F. 2d 209, 215 (C.A. 1st Cir.).

(2) The denial of procedural and substantive due process by joint application of statutes.

The joint application of § 618-a C.C.P. with § 2447 Penal Law to the facts herein, involving a New York non-resident, violates due process under the Fourteenth Amendment where the non-resident witness is a potential defendant and target of investigation. The granting of local state immunity is not co-extensive with the existing perils of prosecution and dissipates the witness's plea of privilege in his home state, other states, and the Federal government. The joint statutory application to the facts herein circumvented the constitutional safeguards of the witness.

The federal questions involved herein are real and substantial. The certificate of the Court of Appeals amending the remittitur shows that it considered the constitutional

questions and that such consideration was necessary to the court's determination.

Although Penal Law § 2447 has been upheld as constitutional, this is the first case in which it has been applied to a non-resident who must return to his home state. In the instant case, the transmittal of grand jury minutes to a state agency obligated by law to cooperation with other states and the Federal government (§§ 7051-7057, Unconsol. Laws), vitiates and nullifies the state and Federal constitutional privilege against self-incrimination and is repugnant to the Fourteenth Amendment. Although validly applied in other cases, the application of Penal Law § 2447 to the facts herein rendered the statute invalid.

§ 618-a C.C.P. is applicable solely to material witnesses and not as here to a potential defendant and target of investigation. That appellant was a potential defendant is apparent from the District Attorney's statement to him before the Grand Jury (R. 71). Cf. *State of New York v. O'Neill*, 359 U. S. 1, 8, where the constitutionality of this statute was upheld provided a hearing is held. However, Mr. Justice Frankfurter at page 8 declared:

> "No claim is before us that the administration of the statute in the particular circumstances of this case violates due process."

In the instant case, repeated claim was made that no hearing on materiality was held (although the order of the forwarding state so declares), despite the reservation of his claim and rights to a hearing on the issue of his materiality as a witness; that no crime was committed; that the grand jury had no authority and jurisdiction to investigate a party; and that the grand jury was created as a "tool",

or implement of the Office of the Commissioner of Investigation.

Assuming, but not conceding, the proper application of § 618-a C.C.P. herein, the further use of § 2447 Penal Law to the non-resident herein cries injustice where no direction to answer was made to the witness and *no opportunity given to the witness to be heard as to why his plea of privilege was asserted*, or to prove the existing perils of prosecution. The instant grand jury minutes were transmitted pursuant to orders signed by the same trial judge, to the Acting Commissioner of Investigation on January 15, 1958, and subsequently on August 1, 1958 to the Commission of Investigation, and thereafter on August 4, 1959 to the United States Attorney for the Southern District of New York, for use at trial of Indictment #C-159-35 in which petitioner was a defendant. These facts were reason enough to establish peril of prosecution. Further, the trial judge had judicial notice (and actual notice) of the statute (Unconsol. Laws § 7052 subd. (5), (6), (7) and (9)) of the obligation of the Commission to cooperate with other state and federal agencies.

It is the joint application of these statutes to the facts herein which constitutes a denial of substantive and procedural due process.

In the light of common investigatory practices of state and county grand juries with extra-territorial powers of subpoena upheld by this Court (*New York* v. *O'Neill*, 359 U. S. 1), a non-resident witness's constitutional rights of privilege against self-incrimination in his home state, other states and the Federal government, should be clarified and ordained.

It was obvious to the trial court that the New York immunity to a non-resident in exchange for testimonial compulsion, was not co-extensive with the existing perils of prosecution in his home state, other states and the Federal government where the witness *had* to return home and Grand Jury minutes forwarded to divers agencies cooperating with his home state. Cf. *Heffman* v. *United States*, 341 U. S. 479; cf. *Ullman* v. *United States*, 350 U. S. 422; cf *Knapp* v. *Schweitzer*, 357 U. S. 371.

No case other than the within, involving a non-resident witness of New York, to whom New York immunity is granted, has ever been decided, where existing facts make the offered immunity hollow and not co-extensive with the real perils of prosecution.[1]

(3) *Feldman* v. *United States* should be reconsidered.

The facts herein warrant the reconsideration of the doctrine of *Feldman* v. *United States*, 322 U. S. 487, 489, 493, because of the transmittal[2] of the grand jury testimony to the New York State Commission of Investigation which

[1] The appellant herein was indicted by May 13, 1959 by the United States District Court, S. D. N. Y. for the crime of conspiracy to obstruct justice, based on the incident investigated by the Tioga Grand Jury. He was convicted on January 13, 1960. Appeal is now pending before the Court of Appeals, Second Circuit.

[2] The Tioga County Court issued court orders transmitting copies of the grand jury minutes as follows:

(a) On January 15, 1958, to the Acting Commissioner of Investigation of the State of New York;

(b) On August 1, 1958, to the Commission of Investigation, the successor agency.

(c) On August 4, 1959, to the United States Attorney, Southern District of New York, for use at trial of indictment No. C-159-35, in which respondent was a defendant, was convicted, and is now appealing.

agency is obligated by statute to cooperate with the witness' home state, other states and the Federal government (§ 7052 subd. (5), (6), (Unconsol. Laws).

The current vogue of state investigative committees and investigating grand juries who cooperate with each other and with other states and Federal agencies is nationwide. The state investigative committees, as such, have no extra-state powers of subpoena. Grand juries do. It will become standard practice to have the result as it exists in the within case, where state committees, by statute, are obligated as here (§ 7052 subd. (5), (6), (7) and (9) Unconsol. Laws), to cooperate with other states and the Federal Government. Where this occurs, immunity to non-residents or residents is hollow and definitely not co-extensive with the existing perils of prosecution (*Hoffman* v. *United States*, 341 U. S. 479).

For testimony so extracted to be used in federal and state prosecutions—under threat of contempt for failure to give such testimony—does violence to the rights of the privilege against self-incrimination.

The proper procedure in obtaining such testimony would be for the court to impose secrecy restrictions or to otherwise protect the witness who is on the horns of a dilemma. See *Matter of Haverlands* (*Carcietta*), 204 Misc. 373, 377, 124 N. Y. S. 2d 402, 405-406, *In re Amato*, 204 Misc. 454, 459, 124 N. Y. S. 2d 726, 730. Failure by the trial court to so act makes it an accomplice in a known and existing method to deprive a witness of his privilege against self-incrimination.

(4) The doctrine of *Jack* v. *Kansas* and *Brown* v. *Walker* is inapplicable.

Each of the lower courts have relied upon the doctrine that the immunity granted by a state is sufficient and need not be applicable to the Federal government, and vice versa. *Jack* v. *Kansas*, 199 U. S. 372, *Brown* v. *Walker*, 161 U. S. 591.

This principle was based on the absence of the real danger of multiple prosecutions.

The New York rule is based on *Dunham* v. *Ottinger*, 243 N. Y. 438. But *Dunham* in reaching its conclusion relied upon the secrecy provisions contained in the statute which that case upheld and the misdemeanor punishment for publicizing information obtained pursuant to the statute there involved (§ 352, subd. (5), Gen. Bus. Law) (Vol. 19, McKinney's Consol. Laws). *Dunham* relied on *Brown* v. *Walker*.

In the instant case, the peril of prosecution was real, and not remote. *Hoffman* v. *United States*, 341 U. S. 479. The secrecy provisions of the *Dunham* statute are missing. To the contrary, publicity and cooperation were compulsory. The grand jury minutes were transmitted to state agencies obligated by law to cooperate with other states and the Federal government (§ 7052, subd. (5), (6), (7), (9) Unconsol. Laws).

The New York Court of Appeals relied on *Knapp* v. *Schweitzer*, 357 U. S. 371 which in turn relies on *Jack* v. *Kansas*, 199 U. S. 372.

None of the foregoing cases dealt with a non-resident witness' plea of privilege against self-incrimination where

the perils of prosecution were a reality and where grand jury minutes are freely supplied to federal and state agencies.

The facts herein require the application of *Hoffman* v. *United States*, 341 U. S. 479 instead of *Jack* v. *Kansas*, 199 U. S. 372 because the perils of prosecution were a reality, not a contingency, and the proffered immunity not co-extensive therewith.

CONCLUSION

The petition for a writ of certiorari should be granted.

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APPENDIX "A"

Opinion of the Court of Appeals
(7 N. Y. 2d 571, 200 N. Y. S. 2d 43)

PEOPLE v. RIELA
Cite as 200 N. Y. S. 2d 43

7 N. Y. 2d 571

PEOPLE of the State of New York, Respondent, v.
Anthony Peter RIELA, Appellant.

Court of Appeals of New York.
April 21, 1960.

* * * * *

FULD, Judge.

Anthony Peter Riela was one of the 60-odd guests who had gathered at the country estate of Joseph Barbara in Apalachin, New York, on a November day in 1957. This gathering, having attracted considerable attention from law enforcement officials, became the target of investigation by the Grand Jury of Tioga County. Riela, called as a witness, made two appearances before that body. From the beginning, he refused to answer any questions concerning the "Apalachin meeting", as it has come to be known, on the ground that to do so might tend to incriminate him and, in the course of his two appearances before the Grand Jury, he persisted in the claim of privilege and declined to answer 17 questions about that same subject. Thereupon, at the request of the District Attorney of Tioga County, the Grand Jury, acting pursuant to the authority vested in it by section 2447 of the Penal Law, Consol. Laws, c. 40,

"conferred immunity" upon Riela and ordered him, following the procedure prescribed by the statute, to answer the questions previously put to him. The same 17 questions were again asked and Riela, reiterating his reliance upon the privilege, again refused to answer.

As a consequence of his refusal, the Grand Jury indicted him, charging him, in 17 different counts, with 17 separate crimes of contempt in violation of section 600 of the Penal Law. The defendant waived his right to a jury and went to trial before the County Judge. The latter, finding him guilty on all 17 counts, sentenced him to 60 days in jail upon each, to run concurrently, and imposed a fine of $250 on each count, for a total fine of $4,250.

[1, 2] Before proceeding to an elaboration of the question which prompted the grant of leave to appeal to this court, we consider briefly the only two other points urged by the defendant which warrant discussion: (1) that the immunity provided by section 2447 of the Penal Law had not been properly conferred and (2) that, in any event, such immunity was not broad enough to assure him the protection guaranteed by the Constitution. As to the first, it is necessary only to observe that a reading of section 2447 makes it manifest that the Grand Jury had unquestioned power to confer immunity upon Riela and direct him to answer under pain of prosecution for contempt. And, as to the second point, it is equally clear, under current decisions, that a witness may be compelled to answer in a state proceeding as long as the immunity granted by the state protects against prosecution under *its* laws, even though it may not protect against prosecution by the federal government or by other states. See, e.g., Mills v. Louisiana, 360 U. S. 230, 79 S. Ct. 980, 3 L. Ed. 2d 1193; Knapp v. Schweitzer, 357

U. S. 371, 78 S. Ct. 1302, 2 L. Ed. 2d 1393; Commission of Investigation of State of N. Y. v. Lombardozzi, 5 N. Y. 2d 1026, 185 N. Y. S. 2d 550, appeal dismissed sub nom. Castellano v. Commission of Investigation, 361 U. S. 7, 80 S. Ct. 51, 4 L. Ed. 2d 49.

[3] We come, now, to the real question in the case, namely, whether the defendant is guilty of 17 crimes of contempt or of one. Concerning this, it is our opinion that, while there can be no doubt that Riela's conduct before the Grand Jury constituted criminal contempt under section 600 of the Penal Law, his conviction of 17 separate crimes of contempt, each susceptible to punishment of a year in prison, was totally unjustified.

It is quite true, as the Appellate Division observed [9 A. D. 2d 481, 195 N. Y. S. 2d 563], that "the questions [asked of the defendant] were by no means the same question rephrased", but, in a case such as the present, where the refusal to answer was grounded, albeit mistakenly on the privilege against self-incrimination, the circumstance that no two questions could have been answered by a single response is beside the point. What is of significance is that it was apparent from the very start of his interrogation that Riela, relying upon the privilege, would decline to answer any question bearing on the "Apalachin meeting", and that the questions, different though they were from one another, all related to that one subject. This being so, he is guilty of the single contempt of refusing to give testimony concerning the Apalachin gathering, rather than 17 contempts for refusal to answer individual questions about it. See, e.g., Yates v. United States, 355 U. S. 66, 73, 78 S. Ct. 128, 2 L. Ed. 2d 95; United States v. Costello, 2 Cir., 198 F. 2d 200, 204, certiorari denied 344 U. S. 874, 73 S. Ct.

166, 97 L. Ed. 677; United States v. Orman, 3 Cir., 207 F. 2d 148, 160; Maxwell v. Rives, 11 Nev. 213, 221; Fawick Airflex Co. v. United Elec., Radio & Mach. Workers, Ohio App., 92 N. E. 2d 431, 436, appeal dismissed 154 Ohio St. 206, 93 N. E. 2d 480.

[4] Any other result impresses us as offensive, for, if each separate reassertion of privilege and refusal to answer were to be treated as a distinct contempt, there would be no limit to the number of contempts for which Riela could have been held. The District Attorney could just as well have asked 60 questions about Apalachin—for instance, whether Riela knew each of the 60 individuals reputed to have been present—as 17, and, if each could become the predicate of a distinct contempt, the limit of punishment would then depend only on the extent of the District Attorney's ingenuity and whim. As the Supreme Court said in the somewhat similar case of Yates v. United States (355 U. S. 66, 73, 78 S. Ct. 128, 133, supra), "the prosecution cannot multiply contempts by repeated questioning on the same subject of inquiry within which a recalcitrant witness already has refused answers."

[5, 6] Riela, under existing law, may well have been under the necessity, once he asserted the privilege, of repeating the claim as to each and every question asked him, lest an answer to any one be deemed to effect a complete waiver of the privilege. See e.g., People v. Cassidy, 213 N. Y. 388, 394, 107 N. E. 713, 715; Rogers v. United States, 340 U. S. 367, 372-374, 71 S. Ct. 438, 95 L. Ed. 344; Brown v. Walker, 161 U. S. 591, 597, 16 S. Ct. 644, 40 L. Ed. 819; 8 Wigmore, Evidence [3d ed., 1940], pp. 438-439. This being so—to paraphrase what was said in the Costello case (198 F. 2d 200, 204, supra)—the contempt was total when the defendant

made it clear that he would not answer questions about Apalachin on the ground of self-incrimination and his repeated refusals may not properly be considered as anything more than expressions of his intention to adhere to his initial assertion of the privilege; and, surely, they were not separately punishable. The contempt here to be punished is Riela's misguided refusal to give any testimony about Apalachin, and not his reiteration of that refusal in response to the many questions which the District Attorney elected to put to him.

People v. Saperstein (2 N. Y. 2d 210, 159 N. Y. S. 2d 160, 162, certiorari denied 335 U. S. 946, 77 S. Ct. 825, 1 L. Ed. 2d 856), upon which the People strongly rely, does not support their contrary position; the situation with which we there dealt was essentially different from the one now before us. Saperstein was adjudged guilty of five crimes of contempt because of his evasiveness or, more specifically, his refusal "to state definitely" who were the participants in five separate telephone conversations which had been wire tapped. Each of the contempts was based not upon a refusal grounded on any claim of privilege, but, among other things, on his patently evasive testimony that he did not know, and could not tell, whether he himself had participated in those telephone conversations. These refusals came at different points during the course of testimony which was otherwise freely given, and each refusal was unrelated to every other one. Under such circumstances, there could be no assurance, after the witness had refused to answer the question with respect to the first phone call, that he would likewise refuse to answer the later questions about the other conversations. It was not possible in Saperstein, as it was here, to predict or

foresee the pattern of refusal which necessarily attends the assertion of a claim of privilege.

In short, what distinguishes this case from People v. Saperstein is that here we have a claim of privilege which "carved out an area of refusal". Yates v. United States, 355 U. S. 66, 73, 78 S. Ct. 128, 133, supra. In the present case, the District Attorney necessarily knew, ahead of time, that the claim of privilege once asserted would be repeated, while in Saperstein the prosecutor had to continue questioning to find the limits of the defendant's refusal to answer. In Saperstein, in other words, the District Attorney was engaged in bona fide interrogation, in the sense that he could reasonably have supposed that the witness would answer each of the questions asked, while here the District Attorney repeated 17 questions knowing full well from Riela's response to his first query that he would not answer any of them.

The defendant committed but a single contempt with relation to one subject; his conviction of 17 separate crimes was, therefore, impermissible and the sentences imposed may not stand.

The judgment should be reversed and the case remitted to the County Court of Tioga County for resentence.

DESMOND C. J., and DYE, FROESSEL, VAN VOORHEES, BURKE and FOSTER, JJ., concur.

Judgment reversed, etc.

APPENDIX "B"

Order of the Court of Appeals Denying Motion for Reargument

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighth day of July A. D. 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 414

The People &c.,

Respondent,

vs.

Anthony P. Riela,

Appellant.

A motion for a reargument of the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

(SEAL)

GEARON KIMBALL.
Deputy Clerk

APPENDIX "C"

Order of the Court of Appeals Amending Remittitur

STATE OF NEW YORK,

IN COURT OF APPEALS

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the Eighth day of July A. D. 1960.

Present:

HON. CHARLES S. DESMOND,
Chief Judge, presiding.

Mo. No. 414

The People &c.,

Respondent.

vs.

Anthony P. Riela,

Appellant.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Appendix "C"—Order of the Court of Appeals Amending Remittitur

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States as follows: The defendant contended that the application in his case of §2447 of the Penal Law and §618-a of the Code of Criminal Procedure violated his rights under the Fourteenth Amendment of the Federal Constitution. The Court of Appeals held that the defendant's rights under the Fourteenth Amendment were not violated. (See *People* v. *Riela*, 7 N. Y. 2d 571.)

And the County Court of Tioga County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

(Seal)

Gearon Kimball
Deputy Clerk

APPENDIX "D"

Judgment of Conviction

At an adjourned term of the County Court held in and for the County of Tioga at the Court House in the Village of Owego, N. Y., on the 12th day of July, 1960.

Present:

HON. FRANCIS J. CLOHESSY,
County Judge of Tioga County.

THE PEOPLE OF THE STATE OF NEW YORK

—against—

ANTHONY PETER RIELA

The defendant, Anthony Peter Riela, having been indicted by a Grand Jury sitting in connection with the County Court held in and for the County of Tioga on the 25th day of February, 1958, which indictment sets forth seventeen counts, each of which charges the Crime of Criminal Contempt in Violation of Section 600, Subdivision 6, of the Penal Law of the State of New York, committed on the 25th day of February, 1958,

And the defendant, Anthony Peter Riela, having appeared in County Court with Louis Mansdorf, Esq., his Counsel, and having been tried before the Hon. Francis J. Clohessy, County Judge of Tioga County at a trial without

a jury beginning on September 30, 1958 and terminating on October 3, 1958;

And the Hon. Francis J. Clohessy, County Judge of Tioga County having filed his Decision on the 15th day of October, 1958, finding the defendant, Anthony Peter Riela, guilty under and as charged in each of the seventeen counts of the indictment;

And the defendant, Anthony Peter Riela, having thereafter appeared in County Court with Louis Mansdorf, Esq., his Counsel, on the 24th day of October, 1958, and having been sentenced under the first count of the indictment to sixty (60) days imprisonment in the Tioga County Jail and to pay a fine of $250.00, and stand committed to the Tioga County Jail until the fine be satisfied at the rate of one day for every dollar of the fine unpaid.

And it having been further Ordered that the defendant, Anthony Peter Riela, under each of the sixteen remaining counts be sentenced to imprisonment in the Tioga County Jail for sixty (60) days and to pay a fine of $250.00, and stand committed to the Tioga County Jail until the fine be satisfied at the rate of one day for every dollar of the fine unpaid, it being the intention and Judgment that a sentence of sixty (60) days imprisonment and a fine of $250.00 should apply to and cover each count; and it further being Ordered by the Court that the respective jail sentences of sixty (60) days imprisonment under each of the seventeen counts should run concurrently.

And the defendant, Anthony Peter Riela, having appeared in Court on the 20th day of June, 1960, with Louis Mansdorf, Esq., his Counsel for re-sentencing pursuant to an Order of the Court of Appeals of the State of New York filed May 11, 1960 whereby the Judgment pronounced October 28, 1958 was reversed and the case remitted to County

Court for re-sentencing; and the defendant having made application to the Court for an adjournment of sentence pending an Appeal to the United States Supreme Court; and the sentence having been adjourned until July 12, 1960;

And the defendant, Anthony Peter Riela, having appeared in County Court on July 12, 1960 with Louis Mansdorf, Esq., his counsel, and the Court having set aside and vacated the previous sentence imposed on October 24, 1958, and the defendant, Anthony Peter Riela having been asked by the Clerk if he had any legal cause to show why judgment should not now be pronounced against him, and the defendant having answered in the negative;

And the defendant having waived the 48 hour waiting period;

It is hereby Ordered by the Court that the defendant, Anthony Peter Riela, be imprisoned in the Tioga County Jail for a term of sixty (60) days and pay a fine of $250.00.

La Verne M. Brister
County Clerk

APPENDIX "E"

Statutes Involved

Penal Law § 600. CRIMINAL CONTEMPT. A person who commits a contempt of court, of any one of the following kinds is guilty of a misdemeanor:

* * * * *

6. Contumacious and unlawful refusal to be sworn as a witness, or, after being sworn, to answer any legal and proper interrogatory; * * * (McKinney's Consolidated Laws, Vol. 39, Part 1) L. 1935, c. 299, § 1, eff. April 5, 1935.

CODE OF CRIMINAL PROCEDURE. SECTION 618-a (McKinney's Consolidated Laws, Vol. 66, Part 2)

SECURING ATTENDANCE OF WITNESSES FROM WITHIN AND WITHOUT THE STATE IN CRIMINAL PROCEEDINGS.

1. As used in this section the following words shall have the following meanings unless the context requires otherwise.

"Witness" shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding.

"State" shall include any territory of the United States and the District of Columbia.

"Subpoena" shall include a summons in any state where a summons is used in lieu of a subpoena.

* * * * *

3. Witness from another state subpoenaed to testify in this state. If a person in any state, which by its laws has

made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If said certificate recommends that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state, such judge may direct that such witness be forthwith brought before him; and the judge being satisfied of the desirability of such custody and delivery, for which determination said certificate shall be prima facie proof, may order that said witness be forthwith taken into custody and delivered to an officer of this state, which order shall be sufficient authority to such officer to take such witness into custody and hold him until he may be released by bail, recognizance, or order of the judge issuing the certificate.

• • • If such witness fails without good cause to attend and testify as directed in the subpoena, he shall be punished in the manner provided for the punishment of any witness who disobeys a subpoena issued from a court of record in this state.

• • • • •

5. Uniformity of interpretation. This section shall be so interpreted and construed as to effectuate its general

purpose to make uniform the law of the states which enact it. • • • L. 1936, c. 387, eff. May 1, 1936.

Penal Law § 2447. WITNESSES' IMMUNITY. 1. In any investigation or proceeding where, by express provision of statute, a competent authority is authorized to confer immunity, if a person refuses to answer a question or produce evidence of any other kind on the ground that he may be incriminated thereby, and, notwithstanding such refusal, an order is made by such competent authority that such person answer the question or produce the evidence, such person shall comply with the order. If such person complies with the order, and if, but for this section, he would have been privileged to withhold the answer given or the evidence produced by him, then immunity shall be conferred upon him, as provided for herein.

2. "Immunity" as used in this section means that such person shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter or thing concerning which, in accordance with the order by competent authority, he gave answer or produced evidence, and that no such answer given or evidence produced shall be received against him upon any criminal proceeding. But he may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury or contempt committed in answering, or failing to answer, or in producing or failing to produce evidence, in accordance with the order, and any such answer given or evidence produced shall be admissible against him upon any criminal proceeding concerning such perjury or contempt.

3. "Competent authority" as used in this section means:

* * * * *

(c) The grand jury before which a person is called to answer questions or produce evidence, when such grand jury is expressly requested by the prosecuting attorney to order such person to give answer or produce evidence; * * *.

4. Immunity shall not be conferred upon any person except in accordance with the provisions of this section.

L. 1935, c. 299, § 1, eff. April 5, 1935.

(McKinney's Consolidated Laws, Vol. 39, Part 2.)

UNCONSOLIDATED LAWS, McKINNEY'S VOLUME 65, PART 2. SECTIONS 7051-7057 (STATE COMMISSION OF INVESTIGATION).

Section 7052. FUNCTIONS, POWERS AND DUTIES OF THE COMMISSION.

Subd. 5. The commission shall cooperate with departments and officers of the United States government in the investigation of violations of the federal laws within this state.

Subd. 6. The commission shall examine into matters relating to law enforcement extending across the boundaries of the state into other states; and may consult and exchange information with officers and agencies of other states with respect to law enforcement problems of mutual concern to this and other states.

Subd. 7. Whenever it shall appear to the commission that there is cause for the prosecution for a crime, or for

the removal of a public officer for misconduct, the commission shall refer the evidence of such crime or misconduct to the officials authorized to conduct the prosecution or to remove the public officer.

Subd. 9. The commission shall make an annual report to the governor and legislature which shall include its recommendations. The commission shall make such further interim reports to the governor, or to the governor and legislature, as it shall deem advisable, or as shall be required by the governor.

L. 1958, c. 989 § 2, eff. May 1, 1958.

NEW JERSEY REVISED STATUTES

ARTICLE 2, PRIVILEGES OF WITNESS:

2A:81-4 General Rule:

Except as otherwise provided by statute, a witness shall not be excused from answering any questions relevant and material to the issue (L. 1900, c. 150, §§ 5, 8, pp. 363, 364).

2A:81-5 Personal Privilege Generally.

No witness shall be compelled to answer any question if the answer will expose him to a criminal prosecution or penalty or to a forfeiture of his estate (L. 1900, c. 150, § 8, p. 364).

GENERAL BUSINESS LAW:

(McKinney's Vol. 19, Consol. Laws)

§ 352. Investigation by Attorney General.

5. * * *. Any officer participating in such inquiry and any person examined as a witness upon such inquiry who

shall disclose to any person other than the attorney-general the name of any witness examined or any other information obtained upon such inquiry except as directed by the attorney-general shall be guilty of a misdemeanor. Added L. 1921, c. 649; amended L. 1923, c. 600, § 1; L. 1925, c. 239, § 1; L. 1926, c. 617, § 1; L. 1927, c. 365; L. 1932, c. 214; L. 1935, c. 271; L. 1949, c. 525; L. 1955, c. 553, § 1, eff. April 21, 1955.

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OCT 26 1960
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 460

ANTHONY PETER RIELA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

GEORGE BOLDMAN,
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Owego, New York.

ELIOT H. LUMBARD,
Chief Counsel,

ARNOLD M. WEISS,
Assistant Counsel,

NEW YORK STATE COMMISSION OF INVESTIGATION,

Of Counsel.

CONTENTS

	PAGE
Preliminary Statement	1
The Opinions Below	3
The Constitutional Provision and Statutes Involved	3
The Facts	4
Argument:	
POINT I—Petitioner was accorded full due process protection during this proceeding	6
A. Petitioner's conduct before the Grand Jury constituted criminal contempt under New York law	7
B. The trial court properly rejected petitioner's offers to prove irrelevant facts	10
C. By his voluntary appearance before the Grand Jury, petitioner waived any challenge to the propriety of his presence before that body; and Section 618-a of the New York Code of Criminal Procedure was used properly to bring appellant before the Grand Jury	11
POINT II—Petitioner was fully immunized against State prosecution and his testimony could be commanded by the Grand Jury under pain of contempt	14
Conclusion	17

Page

Appendix:

Subpoena Order 1a

Certificate 4a

Affidavit of George Boldman 7a

Authorities Cited

Cases:

Adamson v. *California*, 332 U.S. 46 (1947) 14

Barron v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833) 14

Blair v. *United States*, 250 U.S. 273 (1919) 10

Brown v. *United States*, 359 U.S. 41 (1959) 8, 9

Commission of Investigation v. *Lombardozzi*, 5 N.Y. 2d 1026 (1959) *appeals dismissed sub nom. Castellano* v. *Commission*, 361 U.S. 7 (1959), and *Mancuso* v. *Commission*, 361 U.S. 10 (1959); *cert. den. sub nom. Riccobono (Miranda* and *Castellano)* v. *Commission*, 360 U.S. 930 (1959) 8, 14, 15

Emspak v. *United States*, 349 U.S. 190 (1955) 8

Hale v. *Henkel*, 201 U.S. 43 (1905) 10

Hendrix v. *United States*, 323 U.S. 178 (1911) 10

Jack v. *Kansas*, 199 U.S. 372 (1905) 14

Knapp v. *Schweitzer*, 357 U.S. 371 (1958) 14

Mills v. *Louisiana*, 360 U.S. 230 (1959) 14, 15, 16

New York v. *O'Neill*, 359 U.S. 1 (1959) 12

PAGE

People v. *Stern*, 3 N.Y. 2d (1958) 10

Quinn v. *United States*, 349 U.S. 155 (1955) 8

Twining v. *New Jersey*, 211 U.S. 78 (1908) 14

Constitutional Provisions

United States Constitution, Amendment V 3, 14, 16

United States Constitution, Amendment XIV 3, 6, 16

Statutes

United States:

Title 11, United States Code, Section 69 7

New York:

Code of Criminal Procedure, Section 618-a 4, 11, 12

Penal Law, Section 600 (6) 1, 6, 9

McKinney's Unconsolidated Laws, Section 7052 ..... 3, 15

of the New York Supreme Court, on January 8, 19[illegible] (1345-1350).*

On October 24, 1958, sitting without a jury, the Tioga County Court, *Clabessy, J.*, entered a judgment of conviction against petitioner (109-118); trial had been held in Tioga County on September 30th and October 1st, 2nd and 3rd, 1958. The original judgment sentenced petitioner to sixty days in jail on each of seventeen separate counts of criminal contempt, all terms to run concurrently, and fined him $250.00 on each count for a total fine of $4,250.00 (116-117). While affirming petitioner's conviction, the Court of Appeals held his contemptuous conduct during his appearance before the Grand Jury constituted but one single contempt and therefore directed that petitioner be resentenced and a new judgment of conviction entered (Jurisdictional Statement, Appendix A, p. 3a). The County Court subsequently resentenced petitioner for the one crime of criminal contempt to sixty days imprisonment and a fine of $250.00 (Jur. State., App. F). It is from this new judgment, entered on July 12, 1960, that petitioner has both petitioned this Court for a writ of certiorari and simultaneously attempted to perfect an appeal as of right (See also No. 415, October Term, 1960).

On July 8, 1960, the Court of Appeals denied petitioner's motion for re-argument, 8 N.Y. 2d 1011 (1960); it also amended the remittitur, 8 N.Y. 2d 1008 (1960), as requested by petitioner, so as to specifically state the federal questions considered by that Court (See Jur. State., App. B and C).

* Numerals in parentheses refer to folio numbers in the record on appeal to the Court of Appeals.

Pertinent documents omitted from the record on appeal are attached to this brief as an Appendix.

The New York State Commission of Investigation assisted the District Attorney of Tioga County in the preparation of this brief pursuant to his request under the provisions of Section 2(4), Chapter 989 of the New York Laws of 1958; Section 7052(4), McKinney's Unconsolidated Laws of New York, which reads:

> "Upon request of district attorneys and other law enforcement officers, the commission shall cooperate with, advise and assist them in the performance of their official powers and duties."

The Opinions Below

The opinion of Judge Fuld on behalf of the Court of Appeals is reported at 7 N.Y. 2d 371, 200 N.Y.S. 2d 43 (1960), and the opinion of Mr. Justice Coon on behalf of the Appellate Division, Third Department, is reported at 9 A.D. 2d 181, 495 N.Y.S. 2d 558 (1959) (1366-1389). The opinion of the Tioga County Court, *Clohessy, J.*, is reported at 14 Misc. 2d 213, 178 N.Y.S. 2d 873 (1958) (1288-1337). Each of these opinions is set out in petitioner's Jurisdictional Statement, Appendices A, D, and E, respectively.

The Constitutional Provision and Statutes Involved

The only constitutional provision cited by petitioner is the Fourteenth Amendment to the United States Constitution.

The pertinent statutory provisions not quoted in this motion are set forth in petitioner's Jurisdictional Statement, Appendix H.

The Facts

On November 14, 1957, the New York State Police reported stopping and questioning at the premises of Joseph Barbara in Apalachin, Tioga County, New York, a large number of persons who resided in various sections of this country and abroad. Petitioner, a claimed resident of New Jersey, was among this group (394-395).

The circumstances under which these individuals were found—the simultaneous attendance of this particular, large and diverse group in a remote location on a Thursday in November—indicated extensive planning and unity of purpose. The meeting attracted extraordinary attention. The Grand Jury of Tioga County, *the location of this event*, initiated an investigation shortly thereafter to determine whether any crimes had been planned or committed in connection with that meeting (389-391, 403).

The Grand Jury was particularly concerned with possible violation of the laws against criminal conspiracies, bribery of public officials, and monopoly and restraint of trade (12, 389-391, 409, 493).

Accordingly, pursuant to Section 618-a of the Code of Criminal Procedure, the New York enactment of the Uniform Reciprocal Witness Act, a certificate was obtained from the Tioga County Court stating petitioner was a "material and necessary" witness

the Grand Jury's investigation (Appendix to this brief, p. 4a). A hearing thereafter was held in the Essex County Superior Court of New Jersey, where petitioner apparently resided, and the usual form of subpoena-order subsequently issued directing petitioner's appearance before the Tioga County Grand Jury (Appendix to this brief p. 1a). After issuance of this subpoena petitioner chose to appear voluntarily before the Grand Jury (130-141).

Upon appearance on February 25, 1958, petitioner exercised his privilege against self-incrimination as to seventeen questions directed to him by the Grand Jury concerning the meeting at Barbara's (214-222). The Grand Jury then voted to confer and did confer immunity upon petitioner at the request of the District Attorney (222-226). Petitioner was informed immunity was conferred under the authority of Section 2447 of the Penal Law, and further told the meaning and scope of that conferral; he was clearly warned that failure to respond after immunity was conferred might result in contempt proceedings such as this very case (227-230).

The first question to petitioner was then repeated and again he refused to answer (230). The Foreman of the Grand Jury, upon request of the District Attorney, then directed petitioner to answer the question (231). Petitioner continued to refuse to answer that question and the following sixteen questions, although directed to do so as to every question (231-254). In each instance his refusal took the form of claiming his privilege against self-incrimination even

though immunity had been conferred upon him (231-254).

Counsel to petitioner accompanied him to Tioga County for this appearance and was available outside the grand jury room during his direct refusals to respond to any questions concerning the Apalachin meeting (228-230).

The Grand Jury then indicted petitioner under Section 600(6) of the Penal Law for criminal contempt (10-82). The seventeen counts in the indictment represented refusal of petitioner to answer each of the seventeen questions put to him before the Grand Jury on February 25, 1958 (10-82).

As noted, a judgment of conviction was entered on October 24, 1958 after trial without a jury (109-118).

ARGUMENT

POINT I

Petitioner was accorded full due process protection during this proceeding.

Various allegations have been made by petitioner that his conviction is "repugnant" to the due process clause of the Fourteenth Amendment to the United States Constitution. These allegations basically relate to three separate areas, although not so stated in the Petition (see Petition: Questions Presented For Review pp. 2-3; Timely Raising of Federal Questions pp. 5-9; Reasons For Granting the Writ pp. 9-18). Each is discussed below, although the basic answer to

each is essentially the same: the allegations are without merit and, in any event, concern matters of state criminal procedure, approved by the highest state court that by no analysis are so extreme in their consequences as to warrant action by this Court.

A. Petitioners conduct before the Grand Jury constituted criminal contempt under New York law.

Petitioner contends that a conviction for contempt of a New York grand jury must include the element of failure to comply with a direction of a New York of the Fourteenth Amendment to the United States Constitution.

Petitioner's misconception arises from a failure to recognize that contempts are of many varieties. Contempt is not limited to contempt of court, but may be committed against other bodies or officers. Contemptuous behavior before such other body, be it a legislative committee, a referee in bankruptcy or a grand jury (as here) may be made a crime. An additional disobedience to a court, which is what the extra element of a court direction would require, is not necessary in New York. And, indeed, federal law contains examples of statutes providing for contempt other than of a court, *e. g.*, Title 11, United States Code, Section 69 (contempt of a referee in bankruptcy).

Cases cited by petitioner fail to establish that contempt of a body other than a court requires the additional direction by a court to answer; some did not include a court direction to comply. Nevertheless,

in each case the conviction was upheld by this Court. *Emspak* v. *United States*, 349 U.S. 190 (1955) (contempt of Congressional Committee); *Quinn* v. *United States*, 349 U.S. 155 (1955) (contempt of Congressional Committee); *accord*, *Commission* v. *Lombardozzi*, 5 N.Y. 2d 1026 (1959), *appeals dismissed sub nom. Castellano* v. *Commission*, 361 U.S. 7 (1959) and *Mancuso* v. *Commission*, 361 U.S. 10 (1959); and *cert. denied sub nom. Piccobono* (*Miranda* and *Castellano*) v. *Commission*, 360 U.S. 930 (1959) (defiance of New York State Commission of Investigation by others at the Apalachin meeting).

Authorities referred to by petitioner do establish, however, that the body before whom the contempt is committed, whatever body it be, must direct the witness to answer. *Emspak* v. *United States*, *supra*; *Quinn* v. *United States*, *supra*. The purpose of the direction is to make clear to the witness what particular testimony is demanded of him by his interrogator. Without such a direction, the element of criminal intent may not be established beyond a reasonable doubt. This petitioner was directed by the Grand Jury to answer each and every one of the seventeen questions. Accordingly, there is no doubt of the Grand Jury's demand for his testimony, nor of the petitioner's criminal intent. Moreover, the Court of Appeals finally held petitioner's entire appearance constituted one criminal contempt so specific directions as to each question might not *now* be required in New York so long as the witness' general course of contemptuous conduct is clear.

Petitioner's reliance on *Brown* v. *United States*, 359 U. S. 41 (1959) is ill-founded. *Brown* involved procedural questions regarding federal grand juries, a different statute and thus a completely different issue

The statute involved in *Brown* was a federal contempt statute which specifically included as an element of grand jury contempt defiance of a court direction. Section 600 (6) of the Penal Law, as interpreted by the Court of Appeals below, does not require a court direction as an element of a grand jury contempt.

The issue in *Brown* also was completely different. It involved the due process requirements of notice and opportunity to defend. Specifically, the question in *Brown* was whether, after a contempt is complete, a United States District Court may recall the contemnor, have him repeat his defiance before the Court, and thereby commit a second contempt. This second contempt, committed in the presence of the Court, allows the Court to impose a summary sentence and thereby deprive contemnor of notice and hearing protections he would have been accorded had he not been recalled by the District Court. This Court held the recalling of the witness and the resultant summary contempt commitment were proper.

The due process questions of notice and opportunity to be heard are not in issue in this case. Moreover, the most casual perusal of the record below will show petitioner was given a full scale criminal trial with adequate notice and opportunity to defend and that he fully availed himself of these basic rights. The trial accorded him all recognized standards of procedural due process.

B. The trial court properly rejected petitioner's offer to prove irrelevant facts.

Petitioner asserts the County Court erroneously refused to hear his proof that the Grand Jury was acting without authority, as the Grand Jury did not establish it was investigating a specific crime.

Decisions in the New York courts and in this Court firmly recognize a grand jury's authority to investigate suspicious circumstances to determine whether a crime has been committed. A prior showing that a specific crime definitely was committed has never been and could not be a prerequisite to the institution of a grand jury investigation. *Blair* v. *United States*, 250 U.S. 273, 282 (1919); *Hendrix* v. *United States*, 323 U.S. 178 (1911); *Hale* v. *Henkel*, 201 U.S. 43, 65 (1905); *People* v. *Stern*, 3 N.Y. 2d 658 (1958).

The County Court below found the Grand Jury was impaneled and conducted with meticulous compliance with New York statutory provisions (1304-1337, Opinion of CLOHESSY, *J.*). In addition, the meeting on a Thursday morning in a remote hamlet in central New York State of sixty-two men with notorious records in organized criminal activity, their flight from the State Police, their extraordinary explanations to the Police, and other facts, certainly provided sufficient ground for the Grand Jury investigation.

Accordingly, the Court's rejection of petitioner's offer to prove no specific crime subsequently was charged or established by the Grand Jury was in full accordance with law. Surely petitioner cannot appeal to argue a grand jury inquiry is illegal simply because

no substantive indictments were filed and his contemptuous conduct must thereby be "forgiven".

Furthermore, this alleged error or any similar allegation of bad faith on the part of the Grand Jury is in no sense a federal issue for this Court.

* * * * *

Similarly, petitioner's offer to prove that immunity granted in New York would not protect him from prosecution in New Jersey, or that the danger of such prosecution was real or imminent, was properly rejected. As demonstrated in Point II, *infra*, proof of such a nature is irrelevant since protection from prosecution under the laws of the sovereign which grants immunity is all that it may confer.

C. By his voluntary appearance before the Grand Jury, petitioner waived any challenge to the propriety of his presence before that body; and Section 618-a of the New York Code of Criminal Procedure was used properly to bring appellant before the Grand Jury.

The County Court found, on the basis of the record (130-141), that petitioner appeared voluntarily before the Grand Jury. He did so after the Superior Court of New Jersey, Essex County, found as a matter of fact that petitioner was a material and necessary witness in the Tioga County, New York, grand jury proceedings and thereby ordered him to appear. Accordingly petitioner has waived any challenge of unconstitutionality to Section 618-a of the Code of Criminal Procedure.

But assuming, *arguendo*, that petitioner's attendance before the Grand Jury was not voluntary, his challenges against Section 618-a nevertheless are without merit.

Section 618-a of the Code of Criminal Procedure is New York's codification of reciprocal legislation enacted in at least forty-three States to provide for securing the testimony of out-of-state witnesses at criminal proceedings, including grand jury inquiries. This reciprocal legislation is commonly referred to as the Uniform Reciprocal Witness Act. The Florida codification of this Act, and virtually identical to the New York Act, was sustained as constitutional by this Court in *New York* v. *O'Neill*, 359 U.S. 1 (1959).

The provisions of this Act defining persons subject to its command are clear. In Sub-section 1 the term "witness" is defined to include "a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding". Sub-sections 2 and 3 state the only limitations on this broad definition of "witness". They require that the witness be "material" and "necessary".

With no basis in precedent or reason, petitioner seeks to avoid command of the statute by engrafting an unfounded restriction onto the statutory definition of "witness". Out of whole cloth, he creates a new conception—"potential defendant". Without explanation or definition of the term, he contends that he is such a person and, therefore, cannot be subjected to the Act, *even though he was given immunity from prosecution and so can never be an actual defendant.*

"Potential defendant" is nowhere defined by petitioner and appears to be based entirely on a routine statement of the District Attorney in the Grand Jury room, advising him of his rights to assert his privilege against self-incrimination during the Grand Jury pro-

ceeding. The statement of the District Attorney is as follows:

> "Now should you feel at any time, any answer you may make may tend to incriminate you, or subject you to prosecution for a crime, you have a right to assert your constitutional privilege against self-incrimination by saying: 'I refuse to answer on the ground that my answer may tend to incriminate me.'
>
> "It is quite conceivable, in the course of this investigation, you may turn out to be a defendant, although we are calling you as a witness in this investigation. It is for you to assert your privilege against self-incrimination. It is for you to say at any time when an answer you may give may tend to incriminate you, that it does tend to incriminate you." (211-213)

These harmless but quite appropriate statements of the District Attorney made solely to advise petitioner of his rights against self-incrimination are now made to appear monstrous and the basis for alleging a violation of the Fourteenth Amendment.

The sincerity of petitioner's position is cast in doubt when in one part of his argument he considers himself a potential defendant and in the next moment challenges the Grand Jury's authority to investigate him since they failed to establish the commission of a crime.

Not only is there no merit to this completely specious argument but such a warning by the District Attorney should be encouraged and not used as a ground for claims of improper conduct.

POINT II

Petitioner was fully immunized against state prosecution and his testimony could be commanded by the Grand Jury under pain of contempt.

This Court consistently has rejected efforts in any form to superimpose the privilege against compulsory self-incrimination on states or state proceedings. It has ruled repeatedly that the Fifth Amendment to the United States Constitution is not available to prevent state coercion of testimony from witnesses fully immunized against state prosecution. In addition it has consistently ruled that neither the due process clause nor the privileges and immunities clause of the Fourteenth Amendment incorporates the Fifth Amendment privilege against compulsory self-incrimination so as to make that privilege available during state proceedings. *Mills* v. *Louisiana*, 360 U.S. 230 (1959); *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958); *Adamson* v. *California*, 332 U.S. 46 (1947); *Twining* v. *New Jersey*, 211 U.S. 78 (1908); *Jack* v. *Kansas*, 199 U.S. 372 (1905); *accord*, *Commission* v. *Lombardozzi*, 5 N.Y. 2d 1026 (1959), *appeals dismissed sub nom. Castellano* v. *Commission*, 361 U.S. 7 (1959) and *Mancuso* v. *Commission*, 361 U.S. 10 (1959); and *cert. denied sub nom. Riccobono (Miranda and Castellano)* v. *Commission*, 360 U.S. 930 (1959); *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833).

Petitioner brings nothing new to this forum. His contention is nothing more than an attempted evisceration of the holdings in *Mills* v. *Louisiana*, 360 U.S. 230 (1959), and other cases recently decided in this

court. And it is significant that nowhere in the course of his argument on immunity does petitioner even mention *Mills*. There are no "unique factors" in his case which make those decisions inapplicable, as an examination of his arguments quickly reveals:

1. Petitioner contends that the Commission of Investigation, to whom the grand jury minutes were made available, is required by statute to cooperate with federal authorities, and that the resultant increased exposure to federal prosecution renders his immunity ineffectual.[1] This precise argument was raised in this Court by four defiant witnesses testifying before the Commission of Investigation. Provisions of the very same statute, Section 7052 (5), McKinney's Unconsolidated Laws, were cited. The Court made preliminary disposition of each of these cases, dismissing two on appeal, *Castellano* v. *Commission of Investigation*, 361 U.S. 7 (1959); *Manuso* v. *Commission of Investigation*, 361 U.S. 10 (1959), and refusing to grant certiorari for the others, *Riccobono, Mercado and Castellano*, 360 U.S. 930 (1959).[2] Actually, the Commission was not in existence at the time, having commenced office on May 1, 1958.

2. Petitioner also contends the danger of prosecution in foreign states is real and imminent. This Court's decision in *Mills* v. *Louisiana*, 360 U.S. 230 (1959), must end any lingering speculation by petitioner that either imminence of foreign prosecution or federal-state cooperation will make the federal privilege against self-incrimination applicable to state proceedings.

The facts in *Mills* were stipulated. The cooperation to be admitted was significant and an accomplished

fact. It did not consist of merely a statutory duty or authority to cooperate, which is the most petitioner may demonstrate here. Furthermore, the danger of federal prosecution in *Mills* was imminent. Indictments against persons implicated had already been returned. A grand scale federal investigation by the United States Attorney for the Eastern District of Louisiana, and the Internal Revenue Service, was in full swing. And as Mr. Chief Justice Warren noted in his dissenting opinion: "Doubt which might have existed concerning federal interest in petitioners' possible tax evasions was removed when petitioners were induced to waive the statute of limitations for relevant tax years" 360 U.S. at 234.

This Court held neither of these factors converted the Fifth Amendment directly, or through the vehicle of the Fourteenth Amendment, into a prohibition against the states or state action in enforcement of its fundamental police powers through conferring immunity.

CONCLUSION

The petition for a writ of certiorari to the New York Court of Appeals should be denied in all respects.

Respectfully submitted,

GERALD BOLEMAN,
District Attorney, Tioga County,
Attorney for Appellee,
27-29 Lake Street,
Owego, New York.

ELIOT H. LUMBARD,
Chief Counsel,

ARNOLD M. WEISS,
Assistant Counsel,

NEW YORK STATE COMMISSION OF
INVESTIGATION,
Of Counsel.

Subpoena Order

SUPERIOR COURT OF NEW JERSEY

ESSEX COUNTY

(Law Division—Criminal)

In the Matter

of

The Application of the People of the State of New York for an order requiring one ANTHONY PETER RIELA, to appear before the County Court Grand Jury of the County of Tioga, State of New York.

To any Sheriff or Constable in the State, to forthwith serve and make return according to law.

Greeting:

The matter of the issuance of a subpoena-order requiring Anthony Peter Riela to attend and testify as a witness for the People of the State of New York in a Grand Jury proceeding pending before the Grand Jury of the County of Tioga, State of New York, on February 4, 1958, having come on to be heard on the 3rd day of February, 1958, pursuant to an order made by the undersigned, dated the 27th day of January, 1958, the said Anthony Peter Riela appearing in person with his attorney, Anthony Calandra, and consent to appear therein, and after hearing all of the parties, it is found as follows:

That said Anthony Peter Riela is a material and

necessary witness in the said Grand Jury proceeding before the Grand Jury of the County of Tioga in the State of New York, and that the presence of said Anthony Peter Riela as a witness for the People of the State of New York in said Grand Jury proceeding is required on the following dates: February 13th, 1958, at 10:00 o'clock in the forenoon of that day, and for as many days thereafter as the Court may direct, not exceeding fifteen (15) days, and that the states of New York and New Jersey have made reciprocal provisions in their laws for securing the attendance of witnesses from within and without the respective states in criminal proceedings, to wit, in the State of New York, Section 618-a of the Code of Criminal Procedure and in the State of New Jersey, Section N. J. S. 2A:81-20; and that the laws of the State of New York in which such proceeding is pending give him protection from arrest or service of civil and criminal process while in the State of New York, and going and passing through the State of New York in obedience to a subpoena-order directing said Anthony Peter Riela to attend and testify in said State of New York in said Grand Jury proceeding and while returning therefrom in connection with matters which arose before his entrance into said State of New York pursuant to said subpoena-order, all of which appears from a certificate of the Judge of the County Court of the County of Tioga, State of New York, a court of record, of which a copy is hereto attached and made a part hereof; and it is further found that the attendance of said Anthony Peter Riela as such witness in said Grand Jury proceeding on the dates aforesaid as a witness for the People of the State of New York upon said Grand Jury proceeding will not cause undue hardship to said Anthony Peter Riela.

AND IT IS HEREBY ORDERED, That said Anthony Peter Riela be and he hereby is subpoenaed and commanded to be and appear before the Grand Jury of the County of Tioga, State of New York, at the County Courthouse, in the Village of Owego, County of Tioga, State of New York, on the following dates, to wit: February 13th, 1958, at 10:00 o'clock in the forenoon of that day, and for as many days thereafter as the Court may direct, not exceeding fifteen (15) days, and then and there testify and the truth to speak in a Grand Jury proceeding therein pending, entitled "The People of the State of New York v. John Doe, *et al.*"

Hereof fail not at your peril.

WITNESS, the Hon. Alexander P. Waugh, Judge of the Superior Court of New Jersey, at the County Courthouse, Newark, New Jersey, this 3rd day of February, 1958.

s ALEXANDER P. WAUGH
Judge of the Superior Court of
New Jersey

[Certification of County Clerk omitted]

Certificate

COUNTY COURT, STATE OF NEW YORK

COUNTY OF TIOGA

In the Matter

of

The Investigation by the January 1958 County Court Grand Jury in and for the County of Tioga entitled

"THE PEOPLE OF THE STATE OF NEW YORK

—against—

'JOHN DOE,' *et al.*"

Re: ANTHONY PETER RIELA, material witness. State of New Jersey.

Upon reading the annexed affidavit of George Boldman, District Attorney of the County of Tioga, sworn to on January 24, 1958, and pursuant to Section 618-a of the Code of Criminal Procedure of the State of New York (Chapter 387 of the Laws of 1936),

I, FRANCIS J. CLOHESSY, Judge of the County Court of the County of Tioga, do hereby Certify,

FIRST: The County Court of the County of Tioga is a Court of Record of the State of New York.

SECOND: The District Attorney of Tioga County has been conducting before the January 1958 County

Court Grand Jury in and for the County of Tioga an investigation, bearing the above title, to determine whether the crimes of conspiracy, bribery of public officials, and violation of Section 340 of the General Business Law were committed in Tioga County. This County Court Grand Jury is conducting an inquiry into the activities that took place at a meeting in Apalachin, New York, on or about November 14, 1957, attended by over sixty-two persons from all parts of the country.

THIRD: Anthony Peter Riela, now present in the State of New Jersey, is a material and necessary witness in the said Grand Jury investigation. Information available to the District Attorney of the County of Tioga establishes that the said Anthony Peter Riela, now residing at 7 Benvenue Avenue, West Orange, New Jersey, was one of the persons who attended the alleged meeting in Apalachin, County of Tioga, New York, on November 14, 1957. Evidence already adduced before this Grand Jury indicates that the said Anthony Peter Riela did attend the aforesaid meeting at Apalachin, New York on November 14, 1957. In view of this and other testimony adduced before this Grand Jury and before the District Attorney, it is material and necessary that the said Anthony Peter Riela be called as a witness before this same Grand Jury.

FOURTH: The presence of the said Anthony Peter Riela will be required before the said Grand Jury on January 31, 1958, at ten o'clock in the forenoon, at the County Courthouse, Tioga County, Owego, New York, and for as many days thereafter as the Court may direct, not exceeding fifteen days.

FIFTH: The attendance of the said Anthony Peter Riela before the Grand Jury can not be ensured voluntarily.

SIXTH: It will not cause undue hardship to the said Anthony Peter Riela to attend and testify before the said Grand Jury.

SEVENTH: The laws of the State of New York will give to the said Anthony Peter Riela, while in the State of New York in obedience to an order directing him to attend and testify before the said Grand Jury in New York, protection from arrest and the service of process, civil or criminal in connection with matters which arose before his entrance into New York under such order.

FRANCIS J. CLOHESSY
County Judge of Tioga County

(Seal).

Done and sealed in the County Court of the County of Tioga, State of New York, 24th day of January, 1958.

Attest:

LAVERNE M. BRISTER
Clerk of the Tioga County Court

By JAMES E. FRASER
Deputy Clerk

(Seal)

[Certifications of Court and County Clerk omitted]

Affidavit of George Boldman

COUNTY COURT, STATE OF NEW YORK

COUNTY OF TIOGA

In the Matter

of

The Investigation by the January 1958 County Court Grand Jury in and for the County of Tioga entitled

"THE PEOPLE OF THE STATE OF NEW YORK

—against—

'JOHN DOE,' *et al.*"

Re: ANTHONY PETER RIELA, material witness, State of New Jersey.

State of New York,
County of Tioga, ss:

GEORGE BOLDMAN, being duly sworn deposes and says:

I am the District Attorney in and for the County of Tioga and presently engaged in the presentation of evidence before the January 1958 County Court Grand Jury of Tioga County, which is conducting an investigation entitled, "The People of the State of New York against 'John Doe,' *et al.*," to determine whether the crimes of conspiracy, bribery of public officials, and violation of Section 340 of the General Business Law were committed in Tioga County.

This County Grand Jury is conducting an inquiry into the activities that occurred at a meeting of over sixty-two persons, from all parts of the country, at Apalachin, County of Tioga, New York, on or about November 14, 1957, to determine whether or not any crimes were committed at said meeting.

Information brought to my attention indicates that many, if not all, of the persons who attended and participated in said meeting have knowledge and information which is material and necessary to the above inquiry, and to the determination of whether or not any crimes were committed at that meeting.

Based on information brought to the attention of the said Grand Jury and to me, it is indicated that Anthony Peter Riela, now residing at 7 Benvenue Avenue, West Orange, New Jersey, was present and in attendance at the said meeting at the aforesaid date. Testimony already adduced before this Grand Jury certifies that the said Anthony Peter Riela was in attendance at the said meeting at Apalachin, New York, on November 14, 1957.

In connection with said inquiry, the Grand Jury is of the opinion that the aforementioned Anthony Peter Riela, by reason of his attendance and participation at the said meeting, has knowledge and information pertaining to, and concerning the specific objectives of said meeting, and knowledge and information which would aid the Grand Jury in determining whether any crime, or crimes, were committed at said meeting.

Twenty-seven of the persons who attended the aforementioned meeting have been subpoenaed to attend and to testify before this Grand Jury. In addition, thirty-one additional witnesses have already testified to material matters of, and concerning, the aforesaid meeting.

I am desirous of obtaining the appearance of the said Anthony Peter Riela before the said Grand Jury, and since Anthony Riela is in the State of New Jersey, his presence in New York cannot be ensured voluntarily, nor can the usual process of Grand Jury subpoena be available to me to ensure his presence before the said Grand Jury.

It is respectfully submitted that it will not cause undue hardship to the said Anthony Peter Riela to attend and testify before the said Grand Jury.

I therefore respectfully submit that this Court, pursuant to Section 618-a of the Code of Criminal Procedure of the State of New York (Chapter 387 of the Laws of 1936) issue a certificate under the seal of this Court certifying to the courts of the State of New Jersey that the said Anthony Peter Riela is a material and necessary witness in the said Grand Jury investigation, and that he will be required to attend and testify before the said Grand Jury on January 31, 1958, at ten o'clock in the forenoon, at the County Courthouse, Tioga County, Owego, New York, and for as many days thereafter as the Court may direct, not exceeding fifteen days.

All of the provisions of the aforesaid statutes relative to the summoning of a witness from another State to testify in this State will be complied with and the said witness, will not, while in this State pursuant to such a summons, be subject to arrest or the service of process, civil or criminal, in connection with matters which arose before his entrance into this State under said process.

I further respectfully request that the certificate applied for herein, upon issuance, be authorization to me to reveal the subject of the said investigation to the extent set forth herein.

No previous application for this relief has been made to any court or judge, except as hereinabove stated.

Respectfully submitted,

GEORGE BOLDMAN

Sworn to before me this
24th day of January, 1958

LILLIAN B. LUTHER
Notary Public State of New York
No. 54-7027900
Originally qualified in Tioga County
My Commission expires March 30, 1958

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IN THE

Supreme Court of the United States

October Term, 1960

No. 460

ANTHONY PETER RIELA,

Petitioner,

—v.—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

	PAGE
POINT I—Petitioner, a New York non-resident grand jury witness, was not accorded due process	1
A. Petitioner's conduct before the New York grand jury was not a completed contempt	1
B. As to petitioner's offers of proof	2
C. As to Section 618-a of the Code of Criminal Procedure	3
POINT II—The immunity allegedly conferred was not co-extensive with the existing perils of prosecution	3
CONCLUSION	4

AUTHORITIES CITED

Cases

Brown v. United States, 359 U. S. 41	2
Carlson v. United States, 209 F. 2d 209 (C.A. 1st Cir.)	3
Gendron v. Burnham, 146 Me. 387, 82 A. 2d 773	3
Hoffman v. United States, 341 U. S. 479	2, 3
Mills v. Louisiana, 360 U. S. 230 (1959)	4
Quinn v. United States, 349 U. S. 155	2
Raley v. Ohio, 360 U. S. 423	2
Spector v. Allen, 281 N. Y. 251	1, 2

Statutes

Sec. 618-a, Code of Criminal Procedure	3
Sec. 7051 et seq. Unconsol. Laws	4

IN THE

Supreme Court of the United States

October Term, 1960

No. 460

ANTHONY PETER RIELA,

Petitioner,

—against—

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

The respondent's misstatements of law and illogical deductions require the submission of this Reply Brief.

POINT I

Petitioner, a New York non-resident grand jury witness, was not accorded due process.

A. Petitioner's conduct before the New York Grand Jury was not a completed contempt.

The respondent asserts that contempt may be committed before a court, agency or officer. However, *the indictment here alleges the crime of criminal "contempt of court"—not contempt of a grand jury.*

"The grand jury is an arm of the court but it is not the court". *Spector* v. *Allen*, 281 N. Y. 251, 258. The direction

of the foreman of the grand jury is not a mandate. *Specht* v. *Allen*, 281 N. Y. 251, 260.

In the instant case, no court direction was made directing the non-resident witness to answer grand jury questions after he asserted his plea of privilege against self-incrimination. That such command is vital to the commission of a contempt is beyond dispute. *Brown* v. *United States*, 359 U. S. 41, 49; *Raley* v. *Ohio*, 360 U. S. 423, 444; *Quinn* v. *United States*, 349 U. S. 155, 167-168; *Hoffman* v. *United States*, 341 U. S. 479, 486.

Speaking of the direction as prerequisite to prosecution for contempt, Mr. Chief Justice Warren, in *Quinn* v. *United States*, 349 U. S. 155, 167-168 declared:

> "*In this country, the tradition has been uniformly recognized in the procedure of both federal and state courts.*" (Citing footnote authorities.) (Emphasis supplied)

The grand jury here was authorized to confer immunity only after a direction that a witness answer. However, it does not have statutory authority to render a judicial interpretation on a plea of privilege against self-incrimination especially where a resident of a foreign state is involved. This is the province of the court alone. *Hence*, the lack of hearing on the constitutional plea is obviously a denial of due process.

B. As to petitioner's offers of proof.

The Trial Court's refusal to permit the petitioner to prove the lack of authority, jurisdiction and good faith of the grand jury, the existing perils of prosecution, and inadequacy of immunity, constituted a denial of due process.

Authority and jurisdiction must always be established and if attacked, proof must always be permitted—within the rules of evidence. This also applies to existing perils of prosecution where a plea of privilege is asserted. When the court denied these rights to petitioner, it denied him due process. *Hoffman* v. *United States*, 341 U. S. 479, 486; *Carlson* v. *United States*, 209 F 2d 209 (C.A. 1st Cir.); *Gendron* v. *Burnham*, 146 Me. 387, 405-406, 82 A. 2d 773, 784-785.

C. As to Section 618-a of the Code of Criminal Procedure.

The order referred to by respondent is not a part of the certified record on appeal herein. It should be disregarded.

The petitioner's alleged waiver, if any, was obtained by application of such order. If, as a result of the illegal use of § 618-a C.C.P., certain actions are now asserted as binding on petitioner, then petitioner claims that § 618-a was used as an *entrapment* to compel his appearance in this jurisdiction.

The initial use of § 618-a C.C.P. to obtain the presence in New York of a non-resident witness is improper when the alleged witness is a potential defendant.

POINT II

The immunity allegedly conferred was not co-extensive with the existing perils of prosecution.

No case involving the grant of New York State immunity to a New Jersey resident who is a New York grand jury witness, under the facts and circumstances herein involved, has ever been reported.

Respondent makes much comment of *Mills* v. *Louisiana*, 360 U. S. 230 (1959). However, there a Louisiana resident was offered immunity in his home state. *A study of the lower court record in Mills v. Louisiana establishes that Mills was directed by the Court to answer grand jury questions. This direction was made in the form of a written order.*

Further, *Mills* v. *Louisiana*, did not involv a non-resident or statute (§ 7051 *et seq.* Unconsol. Laws) authorizing co-operation between the New York Commission of Investigation, other states, and the Federal government, and where grand jury minutes have been transmitted to various authorities pursuant thereto.

CONCLUSION

The petition for certiorari to the County Court of Tioga County, State of New York, should be granted.

Respectfully submitted,

Louis Mansdorf
Attorney for Petitioner
Office & P. O. Address
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New York 7, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1960

No. 460

ANTHONY PETER RIELA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

	PAGE
Reasons for Granting Rehearing and Issuing the Writ	2
I. The issues presented by the within petition for certiorari are almost identical with questions 2 and 3 in *Slagle* v. *Ohio*, 364 U. S. 811, wherein this Court postponed consideration of the jurisdiction question to the hearing of the case on the merits	2
II. The failure of the Court to inform the petitioner of the extent of the profferred immunity, the absence of both hearing and a direction by the Court to the petitioner, constituted a denial of procedural due process	3
III. No opportunity to purge himself was offered to the petitioner by the Court or the Grand Jury foreman	4
Conclusion	5
Certificate of Counsel	6

Authorities Cited

Brown v. United States, 359 U. S. 41, 49	4
Flaxer v. United States, 358 U. S. 147, 151	5
Hoffman v. United States, 341 U. S. 479, 486	4
Levine v. United States, 362 U. S. 610	4
Quinn v. United States, 349 U. S. 155, 161, 168, 170	3
Reina v. United States, 29 L W 4063	3, 5
Sacher v. United States, 343 U. S. 1; 24-25	3
Slagle v. Ohio, 364 U. S. 811, 29 L W 3093	2

IN THE

Supreme Court of the United States

October Term, 1960

No. 460

ANTHONY PETER RIELA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

Petitioner prays that this Court grant rehearing of its order of December 5, 1960, denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the County Court of Tioga County, State of New York, in the above entitled case as prayed for in the petition filed September 30, 1960, herein.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

I. The issues presented by the within petition for certiorari are almost identical with questions 2 and 3 in *Slagle v. Ohio*, 364 U. S. 811, wherein this Court postponed consideration of the jurisdiction question to the hearing of the case on the merits.

The questions there read as follows (29 LW 3093):

2. Were contempt convictions repugnant to Fourteenth Amendment in view of state commission's failure to direct witness to answer questions after their refusal on ground of self-incrimination;

3. Is Ohio immunity statute repugnant to Fifth and Fourteenth Amendments in that it does not grant immunity from prosecution by United States and other states.

Here, the petitioner is not a resident of the state which granted the immunity but is a New Jersey resident who urged his constitutional plea before a New York grand jury.

This Court has not yet decided *Slagle* v. *Ohio* which bears No. 105 on the calendar for argument.

The petitioner may be compelled to serve a 60 day jail term even though this Court should sustain his contentions made in *Slagle* v. *Ohio*.

In all fairness, the within petition should at least be held in abeyance pending the determination of *Slagle* v. *Ohio*.

II. The failure of the Court to inform the petitioner of the extent of the profferred immunity, the absence of both hearing and a direction by the Court to the petitioner, constituted a denial of procedural due process.

After the denial of the petition herein, this Court decided *Reina* v. *United States* (29 LW 4063, *December 19, 1960*). Counsel there "argued that the witness was denied due process of law, since the district court failed to inform him of the extent of the immunity granted by the Narcotic Control Act".

"That is a good reason", Mr. Justice Frankfurter interjected, "why he should not go to jail without more, but it is not a good reason why he should refuse to answer the questions when this Court finishes with the case" (29 LW 3142).

Procedural safeguards should not be disregarded in contempt matters. *Sacher* v. *United States*, 343 U. S. 1, 24-25 (Frankfurter, *J.*, dissent).

A witness must be given a fair apprisal at a hearing of the rejection of his privilege for him to be adjudged in contempt. This applies to state and federal courts. *Quinn* v. *United States*, 349 U. S. 155, 161, 168, 170. *Here, there was no such hearing.*

No apprisal was given to the witness that his plea of privilege was rejected.

After direction by the grand jury foreman, the questions were repeated and were again answered by the non-resident witness with the statement:

> "I refuse to answer the question on the ground that I may incriminate myself."

No court direction was made directing the witness to answer.

In *Brown* v. *United States*, 359 U. S. 41, 49, Mr. Justice Stewart declared:

> "A grand jury is clothed with great independence in many areas, but it remains an appendage of the court, powerless to perform its investigative function without the court's aid, because powerless itself to compel the testimony of witnesses.
>
> It is the court's process which summons the witness to attend and give testimony, *and it is the court which must compel a witness to testify if, after appearing, he refuses to do so.* (Emphasis supplied)

In *Brown* v. *United States*, and *Levine* v. *United States*, 362 U. S. 610, there were court directions to the witness. *Here there were none.*

If the contempt procedure followed herein is established as the law of the land, the day is not far off when a witness can be held in contempt for asserting his privilege before a district attorney or a police officer.

III. No opportunity to purge himself was offered to the petitioner by the Court or the Grand Jury foreman.

No hearing having been conducted before the court to ascertain whether the plea of privilege was justified, it follows that no direction to answer was made, and no opportunity given the witness to purge himself. *Hence, the Court's duty was circumvented. Hoffman* v. *United States*, 341 U. S. 479, 486.

In *Flaxer* v. *United States* 358 U. S. 147, 151, the contempt conviction was reversed because the witness was not given the opportunity to purge himself of the contempt for refusing to answer questions.

In *Reina* v. *United States*, 29 L W 4063, *decided December 19, 1960*, this Court allowed the witness to purge himself of his contempt by appearing within 60 days and answering grand jury questions. This is fair and proper.

The petitioner, Riela, was given no such opportunity to purge himself of the contempt despite his desire now to avoid a 60 day jail term by testifying.

CONCLUSION

For reasons set forth above and in the petition for writ of certiorari, it is respectfully urged that rehearing be granted, and that, upon such rehearing a writ of certiorari issue to the County Court of Tioga County, State of New York.

Respectfully submitted,

LOUIS MANSDORF, ESQ.
Counsel for Petitioner

CERTIFICATE OF COUNSEL

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Rules of this Court.

Louis Mansdorf

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